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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOHN EDWARD HOOPER,

Petitioner,

versus

STATE OF ALABAMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT AND ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Alabama Supreme Court can alter a rule of evidence and apply that ruling retroactively to supply the necessary evidence to convict the Petitioner without transgressing the prohibition against ex post facto law contained in Article I of the United States Constitution or the Due Process Clause contained in the Fifth and Fourteenth Amendments to the United States Constitution.

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Petitioner, John Edward Hooper, respectfully prays that a writ of certiorari issue to review the judgment of the Alabama Supreme Court and the Alabama Court of Criminal Appeals, whereby substantial constitutional issues by Petitioner were not answered by either of the said courts, even

though timely raised.

OPINION BELOW

The ruling by the Alabama Court of Criminal Appeals as to the original appeal filed on January 30, 1989 (Third Division, Number 91) set forth infra in Appendix 1a.

The ruling by the Alabama Supreme Court reversing the decision of the Alabama Court of Criminal Appeals and affirming the Circuit Court of Escambia County, Alabama on December 14, 1990, as set forth infra in Appendix 1b.

The denial of Petitioner's Application for Rehearing by the Alabama Supreme Court on February 8, 1991, as set forth infra in Appendix 1c.

JURISDICTION

The Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §1257(3)

in that the ruling by the Alabama Supreme Court denies him due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and of his right not to be subject to ex post facto law as prohibited by Article I, §§ 9 and 10 of the United States Constitution; hence, Petitioner's application to this Honorable COurt to review the order of the Alabama Supreme Court dated December 14, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Fifth and Fourteenth Amendments of the United States Constitution, as well as Article I, §§ 9 and 10 of the United States Constitution.

The Fifth Amendment of the United States Constitution provides, in part, as follows:

No person shall ... be deprived

> of life, liberty or property, without due process of law.

The Fourteenth Amendment of the United States Constitution, in pertinent parts, provides as follows:

> No state shall ... deprive any person of life, liberty or property, without due process of law.

Article I, § 9 of the United States Constitution provides, in part, as follows:

> No bill of attainder or ex post facto law shall be passed.

Article I, § 10 of the United States Constitution provides, in part, as follows:

> No state shall ... pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

STATEMENT OF THE CASE

Petitioner, a former State Trooper, was indicted in a two count Indictment by the Spring Term of the Escambia County Grand Jury in 1985. He was duly arraigned on July 12, 1985, and entered a plea of not guilty.

Petitioner was first tried and convicted on September 17, 1985, when a jury returned a verdict against him with Rape, Second Degree. This conviction was appealed to the Alabama Court of Criminal Appeals. On October 28, 1986, that court reversed and remanded Petitioner's conviction because of improper cross-examination of character witnesses by the Honorable Don Valeska, Assistant Attorney General.

On September 16, 1988, the Petitioner was again tried by jury and convicted of both Count I and Count II of the Indictment. At that time, sentence was deferred and on

November 2, 1988, the Honorable Bradley E. Byrne announced judgment of sentence on Petitioner as follows:

> Accordingly, I sentence you pursuant to the split sentence statute to 5 years in the state penitentiary on your conviction under Count I, and I sentence you pursuant to the split sentence statute to 5 years on your conviction on Count 2, 5 years, that will be 5 years in the state penitentiary. These sentences are to run concurrently.
>
> Now, I would be unrealistic if I did not expect this case to be appealed based uopn the way this case progressed and some very novel issues that were raised at trial that this court had to deal with, therefore, I am not going to make a determination at this time as to how this sentence should be split, or make a determination as to probation. I am going to reserve all of those questions, all of those issues for determination at a later time once this case has been looked at by the appellate courts of this state, and if it is affirmed then I will make a determination or if no appeal is taken then I will make a

> determination at that time as to how this sentence should be served, whether probation should be granted, and exactly how this sentence should be split.
>
> You will also be required to pay court costs in these cases and the sum of $250.00 to the Crime Victim's Compensation Assessment.

On December 6, 1988, Petitioner filed a Motion for Judgment of Acquittal and Motion for New Trial. Both motions were subsequently overruled and denied by the trial court on January 23, 1989.

At the time of sentencing on November 2, 1988, Petitioner gave oral notice of appeal and subsequently on January 30, 1989, filed further written Notice of Appeal was filed in the Alabama Court of Criminal Appeals. The Alabama Court of Criminal Appeals released an opinion on March 30, 1990 reversing Petitioner's conviction and remanding the case back with an order to the

trial court to enter a judgment of acquittal for the Petitioner. The State filed an Application for Rehearing on April 16, 1990, which was denied on May 11, 1990.

Thereafter, on May 25, 1990, the State petitioned the Alabama Supreme Court for a writ of certiorari to the Alabama Court of Criminal Appeals. The Alabama Supreme Court granted the writ of certiorari on August 27, 1990. On December 14, 1990, the Alabama Supreme Court issued an opinion reversing the Court of Criminal Appeals.

Petitioner subsequently filed an Application for Rehearing in the Alabama Supreme Court which was denied on February 8, 1991.

Hence, this Petition for Writ of Certiorari.

The Petitioner was tried by jury in the Circuit Court of Escambia County,

Alabama, the Honorable Bradley E. Byrne, presiding, during the week of September 12-16, 1988. On September 6, 1988, a pre-trial hearing was held in which the State called Josephine Bahm to establish that Kimberly Hooper, the prosecutrix, was recanting her rape allegations against her father, the Petitioner.

A jury was struck on September 12, 1988 and the trial began on September 14, 1988. The first witness, Kimberly Hooper, called as the court's witness, denied on direct examination by the court the charges contained in the indictment. From pages R-124-125 of the transcript:

> Q. (THE COURT): Did John Edward Hooper engage in sexual intercourse with you on or about September 7, 1984.
>
> A. No, sir.
>
> Q. Did John Edward Hooper engage in sexual intercourse with you on or about December

13, 1984?

A. No, Sir. (R-124-125).

The court then permitted the State to cross-examine the witness. Assistant Attorney General Don Valeska cross-examined Kimberly Hooper primarily by impeaching her with inconsistent testimony she had given at Petitioner's first trial. In the course of this cross-examination, Kimberly, in her prior testimony, accused her father, the Petitioner, of raping her on the dates in question (R-131-132).

Further, the impeachment testimony contained allegations that the Petitioner had been sexually abusing Kimberly since she was five years old (R-129-148). Also, Miss Hooper identified three pornographic tapes offered by the State for identification purposes. She testified live that she had watched these by herself. However, she was

then impeached with her prior testimony wherein she stated that the Petitioner had forced her to view them with him. On cross-examination by the Petitioner, Kimberly again denied that her father had raped her.

According to Kimberly, she told two of her friends that her father had raped her because she did not like them telling her how lucky she was to have a father who was a state trooper. She further stated that she had attempted to recant her story prior to the first trial but had been threatened not to do so. From page 208 of the record:

> Q. And is it a matter of fact, Kimberly, that back there in the back rooms of this courthouse just before the trial of your father on September the 25th that one Amelia Davis threatened you with jail if you didn't come out here and testify against your father?
>
> A. Yes, sir. And also Mr. Rebarchek from the Attorney General's office, Miss Kathy

Hill and Mr. Doug Mitchell.

Q. Tell us what Miss Kathy Hill told you back there just before the trial?

A. That if I did not testify the way that they wanted me to they could have me charged with perjury. (R-208).

and on pages (R-210-211):

Q. Okay. And what other threats or coercion, if there were any, did you receive before your father's trial in September of 1985?

A. Let's see. In July I called a Sergeant Morris and a Lieutenant Evans, they are both state troopers, and told them it was not true and I had been lying, and that Mrs. Davis and Mr. Mitchell called me and told me that they could send a sheriff's deputy or someone to come get me and take me to jail. Then Mrs Davis told me that if I would agree to go to Gulf Coast Hospital and could prove to the people that I was telling the truth when I said it didn't happen then I could go home and they would drop the case. And we had to go to court to get that arranged. And Judge Crow said that I had to go. And then afterwards she

> told me that if I wanted to get out of Gulf Coast Hospital that I had better say it happened or she could make--she could,. how would you say it, she could make sure that I would stay there.

Kimberly also testified at page 209 of the transcript that she had been threatened with perjury charges before her present testimony.

> Q. MR. HARDEN: Have you been told by anyone that you could be charged with perjury today, please, ma'am?
>
> A. Yes, sir.
>
> Q. And who told you that?
>
> A. Mr. Higgins.
>
> Q. Who is Mr. Higgins?
>
> A. I believe an investigator for the Attorney General's office.
>
> Q. Is that Mr. Higgins sitting on the front row right there from the attorney general's office?
>
> A. Yes, sir.

Q. Did he tell you that if you came in this courtroom today that you would be charged with perjury?

A. He told me that my testimony would be perjury because I said a different story in the first trial.

Q. Okay. Do you know what perjury is, Kimberly?

A. Not exactly, sir.

Q. Do you know you can go to jail for it though?

A. Yes, sir. (R-209).

The State called Mr. Donald Champion and Captain L. N. Hagan to identify and discuss the contents of the three pornographic tapes. Thereafter, the State called Stephanie Milam, Tyra Thomley, Michelle Lucas and Carol Middleton to testify that Kimberly Hooper had made complaints to them that her father had raped her. Ms. Middleton, the counselor at Kimberly's school, stated that she reported the abuse to

the Department of Human Resources.

Ms. Sally Aust testified that she overheard a phone conversation between Kimberly Hooper and the Petitioner in which she heard the Petitioner say "I've said I wouldn't do that again" or "I told you I wouldn't do that again" (R-398).

Dr. Jimmy Adkisson testified and was offered as an expert witness. Dr. Adkisson stated that Kimberly Hooper's introitus, the opening of her vagina and her vaginal wall, was enlarged. He said this enlargement could have been from sexual intercourse (R-418).

The State also called Dr. James Chudy as an expert witness "from a psychological standpoint of child abuse" (R-440). Dr. Chudy stated that based upon certain validators used in evaluating children for sexual abuse, he had reached the conclusion that Kimberly Hooper had been sexually abused

(R-448).

The State's final witness was Amelia Davis who had worked for the Escambia County Department of Human Resources and investigated Kimberly Hooper's complaint against her father. She likewise identified the three poronograhic tapes and described the contents. Mrs. Davis further testified that Kimberly had changed her story against her father on several occasions beginning on September 19, 1985.

Finally, Mrs. Davis described numerous emotional problems including nightmares, eating disorders and periods of lying that Kimberly had experienced since she had been removed from her parent's home (R-522-523).

The Petitioner called 22 witnesses to testify as to his good character and his excellent reputation in the community for truth and veracity. Virginia Hooper,

Petitioner's wife, was called and testified as to the pressure placed upon her by Amelia Davis and Doug Mitchell of the Department of Human Resources to believe the accusations against the Petitioner. This included the cancelling and delaying her visitation with Kimberly (R-613). Mrs. Hooper further testified that Kimberly had experienced emotional problems as early as age three (R-618-619) and that to help control her emotional problems Kimberly was prescribed the drug Ritalin (R-622). Mrs. Hooper stated that she had received reports of Kimberly fantasizing after she had been removed from her custody by the Department of Human Resources.

The Petitioner, John Edward Hooper, denied that he had ever sexually abused his daughter (R-658). He further denied that he had made either his daughter or Stephanie

Milam watch an X-rated film (R-658); or that he had ever admitted raping his daughter while talking with her on the phone (R-659).

During cross-examination the Petitioner stated that while he had taken certain X-rated tapes to his home, he did not realize that they were pornographic until he had watched part of one of them. At that point he stopped watching it and returned all of them as soon as possible. During cross-examination, the Petitioner continued to deny that he had ever sexually molested his daughter in any way (R-686).

The Petitioner rested and renewed his Motion for Judgment of Acquittal. The trial court again denied this motion. During the court's charge, Judge Byrne charged the jury as follows on page R-751:

> Now, the prior testimony of Kimberly Sue Hooper given in September of 1985 while she was under oath and subject to

> cross examination can be used by you as substantive evidence of the facts stated by her during her prior testimony to prove or disprove the innocence or quilt of the Defendant John Edward Hooper of the offenses alleged in the indictment. Only the prior testimony of Kimberly Sue Hooper can be considered by you as substantive evidence. (Emphasis added).
>
> Now, the prior testimony, as I have already mentioned, of all the other witnesses or of all the witnesses can be used for impeachment purposes, that is, a witness's prior testimony can be used to show that prior to this trial the witness made statements that are inconsistent with the testimony given in this trial and such prior inconsistent statements can be used by you to judge the credibility of that witness.

The Petitioner requested that the court recharge the jury at pages R-758-759 but the court refused. The Petitioner then moved for a mistrial which was denied by the court.

After he completed the charge, the

trial court finally ruled that due to the inflammatory nature of their contents, the poronographic tapes would not be admitted or taken by the jury to the jury room during deliberation. The jury began deliberating at 4:50 on September 16 and returned a verdict of guilty to both charges at 6:30.

REASONS FOR GRANTING THE WRIT

"There may be procedural changes which operate to deny the accused a defense available under the laws in force at the time of the conviction of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition." Beazell v. Ohio, 269 U.S. 167, 171, 46 S.Ct. 68, 69, 70 L.Ed. 216 (1925). The Alabama Supreme Court, in the present case, ruled on December 14, 1990, altering Alabama's rule concering the admissibility of prior inconsistent statements as substantive evidence and applied the new ruling to Petitioner's trial on September 12-16, 1988, when previously there had been insufficient legal evidence to convict the Petitioner. "Where the guilt or innocence turned on the application of the repealed law, therefore affecting and disadvantaging the defendant in the most substantial manner possible. The odious effect thereof compels us to find it to be ex post facto." Walker v. State, 433 So.2d 469 (Ala. 1982). "If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme

> Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." Bouie v. City of Columbia, 378 U.S. 347, 353-354, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964).

On December 14, 1990, the Supreme Court of Alabama rendered an opinion stating:

> We think that it is time that this Court changed our rule; therefore, after examining the record, considering the arguments of the parties, and re-evaluating the rule against using prior inconsistent testimony as substantive evidence, we hereby change that rule. We hold that a prior inconsistent statement of a witness who takes the stand and is available for cross-examination may be used as substantive evidence if the prior statement was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition. Ex Parte State: In Re: Hooper v. State, _____ So.2d _____ (December 14, 1990).

This decision overruled over one hundred years of case law in Alabama in which

the rule had generally been stated as follows:

> A self-contradictory statement by a witness who is not a party, whether testified to by him on cross-examination or proven by others, is not substantive evidence of the matter asserted, that is, such statement operates only to discredit the witness and has no other effect, in particular, such statement cannot be the basis of a finding of fact necessary to the establishment of liability or defense. C. Gamble, McElroy's Alabama Evidence, §159.02(1), (3d Ed. 1977). See, Cloud v. Moon, 290 Ala. 33, 273 So.2d 196 (1973); Manning v. State, 217 Ala. 357, 116 So. 360 (1928); Lester v. Jacobs, 212 Ala. 614, 103 So. 682 (1925); Corona Coal & Iron Co. v. Callahan, 202 Ala. 649, 81 So. 591 (1919); Porter v. Louisville & Nashville RR, 202 Ala. 139, 79 So. 605 (1918); E. E. Yarbrough Turpentine Co. v. Taylor, 201 Ala. 434, 78 So. 812 (1918); Thompson v. Richardson, 96 Ala. 488, 11 So. 778 (1892); Kennedy v. State, 85 Ala. 326, 5 So. 300 (1888).

In ruling that Kimberly Hooper's prior testimony could be considered as substantive

evidence the Alabama Supreme Court stated: "We think the Federal Rule is a good rule, that it does not substantially prejudice the rights of a defendant to a fair trial, and that it fosters a search for the truth." Hooper v. State, _____ So.2d _____ (Ala., December 14, 1990). However, it is Petitioner's position that this approach places in jeopardy his rights to due process of law and equal protection of the law as guaranteed him by the Fifth and Fourteenth Amendments to the United States Constitution.

The Petitioner would point out that unquestionably the status of the law in Alabama in September, 1988, at the time of his trial, was that prior inconsistent statements of a witness used to impeach that witness are not substantive evidence. A jury was sworn and the State produced as many witnesses and as much evidence as it could.

Yet, at the close of the State's case, there was no question but that with the aforementioned status of Kimberly Hooper's prior testimony, the State failed to make out a prima facie case. The Petitioner was therefore acquitted of both charges by the lack of evidence and, but for the errors of the trial court in improperly ruling that Kimberly Hooper's prior testimony could be considered as substantive evidence in submitting the case to the jury and in charging the jury to that effect, Petitioner would have been acquitted. The Alabama Court of Criminal Appeals so ruled in Hooper v. State [Ms. 3 Div. 91, March 30, 1990], _____ So.2d _____ (Ala.Crim.App. 1990).

However, two years after trial the Alabama Supreme Court changed the law and applied it back two years to supply the evidence needed to convict Petitioner. The

State was well aware, prior to the Hooper trial, that under established Alabama law, Kimberly Hooper's prior testimony could not be used as substantive evidence. Petitioner claims that the ruling by the Alabama Supreme Court changed the law to convict the Petitioner two years after his trial and has the same effect as an ex post facto law, and further deprives him of due process of law.

The prohibition against "ex post facto" laws, of course, comes from Article I of the United States Constitution. The United States Supreme Court in an early case, Calder v. Bull, 3 U.S. 386, 1 L.Ed 648 (1798) defined an "ex post facto" law as:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts greater punishment, than the

> law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender. Calder, supra, at 390.

The United States Supreme Court, in its recent decisions of Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987) and Weaver v. Graham, 450 U.S 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), has interpreted this provision to require that two elements be met for a law to be ex post facto: "It must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." Weaver, supra, 450 U.S. at 29, 67 L.Ed.2d at 23.

The Petitioner contends that the ruling by the Alabama Supreme Court that Kimberly Hooper's prior testimony could be

considered substantive evidence two years after his trial altered Alabama's rule of evidence pertaining to the inadmissibility of prior statements of witnesses, and as a result, make different evidence admissible than not only on the date of the commission of the offense, but at the date of the actual trial resulting in the conviction of the Petitioner. Clearly, this ruling by the Alabama Supreme Court applies directly to the Petitioner's trial prior to its ruling and further, it obviously works to the disadvantage of the Petitioner.

Although, generally it has been held that the prohibition of ex post facto laws applies primarily to the legislative branch, the United States Supreme Court stated in Marks v. United States, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) that:

> ...-- [t]he notion that persons have a right to fair warning of the conduct which will give

> rise to criminal penalties -- is fundamental to our concept to constitutional liberty. See, United States v. Harriss, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed.2d 989 (1984); Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939). As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment. Marks, supra, at 430 U.S. at 188, 51 L.Ed.2d at 265.

The United States Supreme Court continued by quoting from its earlier decision in Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964):

> [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Article I, § 10, of the Constitution forbids.... If a state legislature is barred by the Ex Post Facto clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. Bouie, supra, at 353-354, 84 S.Ct. 1697, 12

L.Ed.2d 894.

In Marks, supra, the United States Supreme Court ruled that the due process clause of the Fifth Amendment precluded the retroactive application of the standards for obscenity enunciated in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) to persons indicted for crimes occurring prior to that decision. In Bouie, supra, the United States Supreme Court reversed convictions for criminal trespass because the South Carolina Supreme Court changed its interpretation of the construction of that State's criminal trespass statute after the commission of the alleged offense. See, Rabe v. Washington, 405 U.S. 313, 92 S.Ct. 993, 31 L.Ed.2d 258 (1970). In so ruling, in Bouie, supra, the United States Supreme Court stated "[t]he basic due process concept involved is the same as that which

the court has often approved in holding that an unforeseeable and unsupported state court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question." Bouie, supra, at 378 U.S. _____, 84 S.Ct. at _____, 12 L.Ed.2d at 895. Therefore, the Petitioner contends that the ruling by the Alabama Supreme Court changing Alabama's rule regarding prior inconsistent statements not only after the date of the alleged crime, but two years after his trial where the evidence should have been legally insufficient for the case to have been submitted to the jury is tantamount to an ex post facto law and is a violation of his due process rights.

Petitioner further recognizes that this Court has held that mere procedural changes are not considered ex post facto

laws. See, Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 453 L.Ed.2d 344 (1977); Thompson v. Missouri, 171 U.S. 384, 18 S.Ct. 92, 30 L.Ed. 204 (1898); Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884). However, the effect of the change of the law in the present case is radically different since the procedural changes in the law in each of those cases occurred prior to the trial of the defendants. In the present case, prior to the ruling by the Alabama Supreme Court that prior inconsistent statements could be admitted as substantive evidence, the Petitioner had already been tried and should have been acquitted under the pre-existing law.

By this argument, the Petitioner is asking that this Court recognize, as the Alabama Supreme Court has recognized, that there are certain procedural changes that so

affect substantive rights of criminal defendants that they run afoul of the ex post facto provision in Article I of the United States Constitution and the Due Process Clause of the Fifth and Fourteenth Amendments. In Walker v. State, 433 So.2d 69 (Ala. 1982), the Alabama Supreme Court recognized such an exception. In doing so, the court quoted substantially from the United States Supreme Court decision, Beazell v. Ohio, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925):

> And there may be procedural changes which operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition....
>
> Just what alterations to procedures will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced without a general formula or stated in a

> general proposition. The distinction is one of degree. But the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation.... Walker, supra, at 473 (quoting Beazell v. Ohio, 269 U.S. 167, 171, 46 S.Ct. 68, 69, 70 L.Ed. 216).

In Walker, supra, the question for the court was whether legislation repealing a law, which made statements made by children while in the custody of law enforcement officers admissible, was in the category of ex post facto legislation. The defendant, Roy Walker, who was seventeen years old at the time of the commission of the offense, had confessed, without the advice of counsel, to a police officer on March 30, 1981. The legislation repealing the above described law became effective on April 28, 1981. At some point thereafter, Walker was tried, his previously inadmissible confession was ruled admissible, and he was convicted.

The Alabama Supreme Court, stating that the application of the rule against ex post facto legislation must be applied on a case by case basis, concluded as follows: "Suffice it to say that, here, where guilt or innocence turns on the application of the repealed law, therefore affecting and disadvantaging the defendant in the most substantial manner possible, the odious effect thereof compels us to find it to be ex post facto." Walker, supra, at 473.

Petitioner contends that it is clear in this case that his guilt or innocence turned on the ruling by the Alabama Supreme Court on the State's request to change the existing Alabama law that prior inconsistent statements could not be considered as substantive evidence. The prejudice to the Petitioner is clear. In every circuit in the State of Alabama for the last one hundred

years, the law on this subject was that prior inconsistent statements used for impeachment were not substantive evidence. When the prior fact situations have arisen, it must be assumed that the trial courts followed established precedent and so ruled. Therefore, the Petitioner was convicted solely because of the capricious and arbitrary ruling of the Circuit Court of Escambia County, Alabama at the behest of the State of Alabama when the time honored doctrine of stare decisis demanded that the previously cited controlling case law be followed. The Alabama Supreme Court, by its opinion on December 14, 1990, condoned and even advocated that ruling and as such, violated Petitioner's constitutional rights.

The Petitioner is charged with two counts of rape against his natural daughter. The Petitioner would agree that acts of

sexual abuse directed against one's own child is a particularly heinous and inhuman offense. Petitioner would further agree that, unfortunately, sexual abuse is a problem for society that has become more and more widespread. Fortunately, recognition that something needs to be done about it has also been forthcoming. Recently, this Court has stated "child abuse is a problem of disturbing proportions in today's society. Just last term, we recognized that '[c]hild abuse is one of the most difficult problems to detect and prosecute, in large part because there are often no witnesses except the victim.' Pennsylvania v. Ritchie, 480 U.S. 39, 60, 107 S.Ct. 989, 1003, 94 L.Ed.2d 40 (1987)." Coy v. Iowa, _____ U.S. _____, 108 S.Ct. 2798, 2803, 101 L.Ed.2d 857 (1988).

However, having said this, the Petitioner would like to insure that such

concern plays no part in this Court's decision making process. It is obvious to Petitioner that the societal concern for the prevention and punishment of sexual abuse has played a role in his case from the moment his daughter, Kimberly, a thirteen year old child with a history of emotional problems, told some friends at school that her father had raped her. Petitioner believes such was also obvious to Alabama Supreme Court Justice Reneau Almon, who wrote in his dissenting opinion:

> If the defendant in fact committed the offenses for which he has been convicted, his conduct is most certainly both legally culpable and morally reprehensible. It is because of the emotional reaction that such acts in gender, coupled with our natural zeal to protect children and to punish those who harm them, that courts must be especially careful to remain objective when presiding over or reviewing cases of this nature. Hooper v. State, _____ So.2d _____ (1991).

The Petitioner would simply like for this esteemed Court to decide whether it is constitutionally permissible for the Alabama Supreme Court to rule, altering a rule of evidence over one hundred years old, and apply that ruling retroactively to, in effect, convict the Petitioner, after he should have been acquitted due to a lack of evidence. The fact that he is charged with the rape of his daughter has no significance. The Petitioner believes that said ruling by the Alabama Supreme Court violated his due process rights guaranteed him by the Fifth and Fourteenth Amendments of the United States Constitution and had the effect of an ex post facto law which is prohibited by Article I, § 10 of the Constitution.

CONCLUSION

The petition for writ of certiorari should be granted and the Petitioner's conviction in the Circuit Court of Escambia County, Alabama should be reversed and rendered due to a lack of sufficient evidence.

The Petitioner is respectfully requesting that this Court safeguard his rights not to be subjected to an ex post facto law in violation of Article I of the United States Constitution and his rights to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

DATED at Evergreen, Alabama this 6th day of May, 1991.

Respectfully submitted,

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90-1742

Supreme Court, U.S.
FILED
MAY 9 1991
OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOHN EDWARD HOOPER,

Petitioner,

versus

STATE OF ALABAMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT AND ALABAMA COURT OF CRIMINAL APPEALS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1989-90

(Released March 30, 1990)

3 Div. 91

John Edward Hooper

v

State

Appeal from Escambia Circuit Court
CC-85-62

BOWEN, JUDGE

John Edward Hooper was convicted of two counts of second degree rape and was sentenced to five years' imprisonment on each conviction. Although Hooper raises nine issues in this appeal from his convictions, we need address only two.

Hooper was originally tried and convicted of these crimes in September 1985. His convictions were subsequently reversed

because the prosecutor had asked improper questions of character witnesses on cross-examination. Hooper v. State, 523 So.2d 469 (Ala.Crim.App. 1986). Hooper was retried and was again convicted in September 1988. Prior to his second trial, the prosecutrix, Hooper's daughter, recanted her allegations.1 She also refused to testify against Hooper at the retrial. It is undisputed that before the second trial the State was aware that she had recanted her stories and would not testify against him.

The prosecutrix was the first witness to testify at the retrial. At the request of the State and over Hooper's objection, she was called as the court's witness and, in response to specific questions posed by the

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1 The prosecutrix had initially made a complaint against Hooper in January 1985, at which time she was 13 years old. It appears from the record that, beginning the month after making her complaint, she has periodically recanted her story.

court, flatly denied that Hooper had committed the acts with which he was charged. Hooper then made a motion for judgment of acquittal, which was denied. The State was thereafter permitted to cross-examine the prosecutrix with respect to her testimony at the first trial. In this manner the State elicited that the prosecutrix had previously testified that Hooper did engage in sexual intercourse with her on the dates alleged in the indictment. The State also elicited the prosecutrix's testimony from the first trial concerning the details of these acts and other sexual acts between her and Hooper.

At the second trial, a school counselor, a social worker, and three friends of the prosecutrix testified that the prosecutrix had told them that Hooper had engaged in sexual intercourse with her. A clinical psychologist, who had interviewed the prosecutrix only once, was called by the

State and testified that the prosecutrix exhibited characteristics of a sexually abused child. There was no eyewitness testimony and the medical evidence indicated only that the prosecutrix's physical condition was consistent with having engaged in sexual intercourse.2 At the second trial, the only evidence incriminating Hooper was the prosecutrix's prior inconsistent testimony and her prior inconsistent statements made to the counselor, the social worker and the three friends.

Hooper's renewed motion for judgment of acquittal, made after the prosecution rested, was denied by the trial court. In his defense, Hooper denied raping or otherwise sexually molesting his daughter.

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2 The prosecutrix testified at the second trial that, prior to 1985, she had had sexual intercourse three or four times with one of her brother's friends. This friend was called as a prosecution witness and denied having ever engaged in sexual intercourse with the prosecutrix.

I

Hooper contends, and we agree, that the trial court erred in giving the following instruction to the jury:

> "Now, the prior testimony of [the prosecutrix] given in September of 1985 while she was under oath and subject to cross-examination can be used by you as substantive evidence of the facts stated by her during her prior testimony to prove or disprove the innocence or guilt of the Defendant John Edward Hooper of the offenses alleged in the indictment."

This instruction was given at the State's request and in reliance on dicta contained in this court's opinion in Randolph v. State, 348 So.2d 858 (Ala.Crim.App.), cert. denied, 348 So.2d 867 (Ala. 1977).

Contrary to the dicta contained in Randolph, 348 So.2d at 866, the Alabama Supreme Court clearly stated in Lester v. Jacobs, 212 Ala. 614, 618, 103 So. 682, 686 (1925): "The general rule in this jurisdiction is that the testimony given on a former

trial by a witness at the last trial in only admissible, after a proper predicate, for the purpose of contradiction or impeachment; it is not competent as cumulative or original evidence." (Emphasis added.) Accord, Manning v. State, 217 Ala. 357, 359, 116 So. 360, 361 (1928) (testimony given at a preliminary hearing could have been introduced, "not as original evidence of fact, but for the purpose of testing the recollection of the witness, or for impeachment") (emphasis added); Porter v. Louisville & Nashville R.R., 202 Ala. 139, 142, 79 So. 605, 608 (1919) ("In no event could [the prior testimony] have been received as original evidence ..., nor do we assume that it was offered for that purpose") (emphasis added). Cf. Corona Coal & Iron Co. v. Callahan, 202 Ala. 649, 650, 81 So. 591, 592 (1919) (in suit for malicious prosecution, it was reversible error to admit

testimony from the underlying trial as original evidence); E. E. Yarbrough Turpentine Co. v. Taylor, 201 Ala. 434, 435, 78 So. 812, 813 (1918) (same); Thompson v. Richardson, 96 Ala. 488, 492, 11 So. 728, 729 (1892) (same). In the event a witness's inconsistent testimony from a prior trial is admitted, the jury should be clearly instructed that this testimony may be considered for impeachment purposes only and not as independent or original evidence. See Manning v. State, 217 Ala. at 359, 116 So. at 362; Kennedy v. State, 85 Ala. 326, 331, 5 So. 300, 301 (1888).

The rationale advanced by the Alabama courts for holding prior inconsistent statements, even those given as testimony in a prior proceeding, inadmissible as substantive evidence is that such statements are "purely hearsay." Corona Coal & Iron Co. v. Callahan, 202 Ala. at 650, 81 So. at 592.

Accord, Thompson v. Richardson, 96 Ala. at 492, 11 So. at 729 ("merest hearsay"). The Federal Rules of Evidence offer a different view with regard to prior inconsistent statements "given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition." Fed.R.Evid. 801(d)(1)(A). Rule 801(d)(1)(A) provides that such a statement is not hearsay where made by a witness who testifies at the present trial and who is subject to cross-examination concerning the prior statement. Several states have adopted this federal rule or a version thereof. See generally 4 D. Louisell & C. Mueller, Federal Evidence §410 (1980 & Supp. 1989) (State Adoptions of Rule 801).

In Randolph v. State, 348 So.2d at 863-64, this court reversed the defendant's conviction because the trial court had failed to specifically instruct the jury that the

prior inconsistent testimony of the State's primary witness, which had been offered for impeachment purposes, could not be considered as substantive evidence. Through an opinion authored by the late Leigh M. Clark, Supernumerary Circuit Judge, we then went on to question the soundness of this aspect of Alabama law. We noted that there is "widespread dissatisfaction with the traditional rule," which is followed in Alabama, and that many judges and scholars "have pressed for repudiation of the rule that prior inconsistent statements of a non-party witness have no substantive consequence in a present trial." Gamble, Howard, & McElroy, The Turncoat of Chameleonic Witness: Use of His Prior Inconsistent Statement, 34 Ala.L.Rev. 1, 18 (1983) (footnotes omitted) (citing Randolph, 348 So.2d at 864). We also discussed Federal Rule 801(d)(1)(A) and the history of its adoption. Randolph, 348 So.2d

at 865-66. Recognizing the incongruity in permitting a witness's prior testimony to be admitted as substantive evidence when the witness is unavailable at the second trial, but not when the witness changes his or her testimony, we indicated our preference for permitting the introduction of a witness's prior inconsistent statement as substantive evidence when the prior inconsistent statement was "made while testifying under oath on a former trial, with the opportunity for cross-examination." 348 So.2d at 866. We offered two "[s]olid and cogent reasons," Id., for our preference:

> "(a) [T]he prior statement was made nearer in time to the occurrence, event, or other matter to which it relates, and therefore when the witness' recollection would be fresher and better, and
>
> "(b) [T]he prior statement is less likely to have been influenced by pressure arising from the controversy, including the cajolery or corruption of, or other tampering with, the witness." Id.

However, our reversal of Randolph's conviction was grounded on existing Alabama law and the remainder of our discussion in that case was purely dictum. Dictum, of course, is merely persuasive and has no precedential value. See Knight v. State, 273 Ala. 480, 486, 142 So.2d 899, 905 (1962); Roquemore v. Sovereign Camp W.O.W., 226 Ala. 279, 282, 146 So. 619, 622 (1933). While we continue to adhere to the view that the Alabama Supreme Court should adopt the federal rule or some version thereof,3 this

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3 As discussed in Randolph, the original proposal of Rule 801(d)(1)(A) required that the prior inconsistent statement have [sic] been made under oath and subject to cross-examination. 348 So.2d at 865. Rule 801(d)(1)(A), as ultimately enacted, does not require that the prior statement have [sic] been subject to cross-examination, nor is it restricted to statements made at a prior trial. In any event, as noted below, this court is without authority to effect a change in this aspect of Alabama law. In view of this fact, we see little point in entering upon a discussion of the relative merits of the federal rule as opposed to the modified rule proposed in

court is not at liberty to take such action. The Alabama Supreme Court cases cited at the outset of this discussion have not been overruled or otherwise modified by that court.4 This court is bound by the decisions of the Alabama Supreme Court, §12-3-16, Ala. Code (1975), and may not "overturn or change [those decisions] in any manner." Passmore v. State, 47 Ala.App. 189, 191, 252 So.2d 115, 116 (1971) (emphasis added). In light of those cases, we have no alternative to the

Randolph. We do note that the Randolph proposal was greeted with approval by commentators. Gamble, Howard, & McElroy, supra, at 16-21.

4 The Supreme Court denied the petition for writ of certiorari filed by the State in Randolph, without opinion or comment. Ex parte State ex rel. Attorney General, 348 So.2d 867 (Ala. 1977). The denial of a petition for writ of certiorari "does not necessarily indicate [the Supreme Court's] approval of all the language used or all of the legal conclusions contained in the opinion sought to be reviewed." Morrison v. Morrison, 287 Ala. 343, 251 So.2d 764, 765 (1971).

conclusion that the trial court erred in instructing the jury that the prior inconsistent statement of the prosecutrix could be considered substantive evidence.

II

Hooper asserts that the evidence was insufficient to sustain his convictions. In light of our discussion in Part I, above, we are constrained to agree.

In order to convict Hooper of second degree rape, the State had to prove that Hooper engaged in sexual intercourse with the prosecutrix while she was between the ages of 12 and 16. See §13A-6-62, Ala. Code (1975). As previously noted, the only evidence

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Accord, Ex parte Glasco, 513 So.2d 61 (Ala. 1987); Ex parte McDaniel, 418 So.2d 934, 935 (Ala. 1982). A "denial of certiorari should never be considered as an expression by the reviewing court on the merits of the controversy." Ex parte Buse, 549 So.2d 1344 (Ala. 1989). We certainly cannot construe the denial of the writ in Randolph as an implicit overruling of the Supreme Court cases cited earlier.

incriminating Hooper was the prosecutrix's prior inconsistent testimony and her prior inconsistent statements made to a school counselor, a social worker and three of her friends.5 In fact, the only actual evidence that a crime had been committed was the prior inconsistent testimony and statements. The substantive evidence contained in this record is the prosecutrix's testimony that Hooper did not not commit the acts charged in the indictment. Under these facts, we must conclude that the evidence was insufficient to sustain the convictions.

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5 The extrajudicial statements to the counselor, social worker, and friends clearly were admissible only for impeachment purposes and not as substantive evidence. E.g., Ex parte Brown, 499 So.2d 787, 791 (Ala. 1986); Cloud v. Moon, 290 Ala. 33, 37, 273 So.2d 196, 199 (1973); Isbell v. State, 57 Ala.App. 444, 450, 329 So.2d 133, 138, cert. denied, 295 Ala. 407, 329 So.2d 140 (1976). The State does not contend otherwise.

Where an appellate court concludes that the evidence is insufficient to sustain a jury verdict, the Double Jeopardy Clause of the Fifth Amendment prohibits a retrial of the defendant on the same charge. Burks v. United States, 437 U.S. 1, 11, 98 S.Ct. 2141, 2147, 57 L.Ed.2d 1 (1978). We are aware that the United States Supreme Court has also held that "the Double Jeopardy Clause allows a retrial where the reviewing court determines that a defendant's conviction must be reversed because evidence was erroneously admitted against the defendant, even where the court also concludes that without the inadmissible evidence there was insufficient evidence to support a conviction. Lockhart v. Nelson, 488 U.S. _____, _____, 109 S.Ct. 285, 290, 102 L.Ed.2d 265 (1988)." Fortier v. State, [Ms. 6 Div. 776, Feb. 23, 1990] _____ So.2d _____, _____ (1990). However, we find Lockhart distinguishable from the case

at bar.

In Lockhart, there was other evidence, aside from the inadmissible evidence, against the defendant. The defendant, Nelson, was given an enhanced sentence under an Arkansas statute which required the prosecutor to prove beyond a reasonable doubt four prior felony convictions. The prosecutor introduced evidence of four prior convictions; however, one of these convictions had been pardoned by the governor, and was therefore null and void. Although Nelson stated at the sentencing hearing that he though the conviction had been pardoned, there was no actual objection to the introduction of the conviction. 488 U.S. at _____, 109 S.Ct. at 288. Therefore, the Court was able to conclude:

> "Permitting retrial in this instance is not the sort of governmental oppression at which the Double Jeopardy Clause is aimed; rather, it serves the interest of the defendant by affording him an

> opportunity to 'obtai[n] a fair readjudication of his guilt free from error.' Had the defendant offered that the conviction had become a nullity by reason of the pardon, the trial judge would presumably have allowed the prosecutor an opportunity to offer evidence of another prior conviction to support the habitual offender charge. Our holding today thus merely recreates the situation that would have been obtained if the trial court had excluded the evidence of the conviction because of the showing of a pardon." 488 U.S. at _____, 109 S.Ct. at 291 (citations omitted) (emphasis added).

In the case at bar, the only indication that Hooper had committed the crime with which he was charged (in fact, the only indication that a crime had been committed at all) was the prior inconsistent testimony of the prosecutrix. While this evidence was admissible for impeachment purposes, it was not admissible as substantive evidence and on this ground Hooper objected numerous times to its admission. Had the trial court properly excluded this

evidence from consideration as substantive evidence, the State, in this particular rape trial, simply had no case. The substantive evidence contained in the record is the prosecutrix's testimony that there were no acts of sexual intercourse between her and Hooper.

Remanding a case for retrial under Lockhart "recognizes that the State may have additional evidence that it did not produce in reliance upon the strength of the erroneously admitted evidence.... However, where it appears from the record that the State produced all available significant evidence at trial and the State does not suggest it has more, an appellate court should remand for the entry of a judgment of acquittal." State v. Baker, 228 N.J.Super. 135, 549 A.2d 62, 66 (1988). Cf. Isbell v. State, 57 Ala.App. 444, 450-51, 329 So.2d 133, 138, cert. denied, 295 Ala. 407, 329 So.2d 140

(1976) (where the only evidence incriminating to the defendant was the prior inconsistent statement of a prosecution witness, "a limiting instruction would not be appropriate, since the insufficiency of the evidence would not justify the case being submitted to the jury, unless it be submitted on the affirmative charge requested by the defendant").

For the reasons stated above, the judgment of the Escambia Circuit Court is reversed and the cause remanded for the entry of a judgment of acquittal.

REVERSED AND REMANDED.

All Judges concur.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1990-91

(Released December 14, 1990)

89-1314

Ex parte State of Alabama

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: John Edward Hooper

v.

State)

Escambia Circuit Court
(CC-85-62)

MADDOX, JUSTICE.

The State asks us to overturn prior cases holding that testimony given under oath at a prior trial and subject to the penalty of perjury is admissible for the purpose of contradiction or impeachment but not as substantive evidence.

The Court of Criminal Appeals, noting that it was "bound by the decisions of [this Court]," held that it had "no alternative to the conclusion that the trial court erred in instructing the jury that the prior inconsistent statement of the prosecutrix could be considered substantive evidence."[1] We reverse and remand.

John Edward Hooper was initially convicted of two counts of second degree rape of his daughter. On his appeal of those convictions, the Court of Criminal Appeals reversed the convictions because the

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[1] The issue was deliberately presented by the State, when, at the trial, the State, relying on dicta in Randolph v. State, 348 So.2d 858 (Ala.Cr.App.), cert. denied, 348 So.2d 867 (Ala. 1977), requested that the trial court instruct the jury that the testimony of the prosecutrix given in a prior trial, under oath and subject to cross-examination, could be used as substantive evidence of the facts stated in the testimony. See Hooper v. State, [Ms. 3 Div. 91, March 30, 1990] _____ So.2d _____ (Ala.Cr.App. 1990).

prosecutor had asked improper questions of character witnesses.

The case was retried, and at the retrial, Hooper's daughter, the prosecutrix, recanted her story. The State questioned the daughter about her previous testimony and, thus, introduced into evidence all of her prior testimony concerning the alleged sexual abuse. The trial court, at the request of the State, specifically instructed the jury that it could consider that prior inconsistent testimony as substantive evidence upon which it could base a conviction.2 The jury

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2 The trial judge gave the following instruction:

> "Now, the prior testimony of [the prosecutrix] given in September of 1985 while she was under oath and subject to cross-examination can be used by you as substantive evidence of the facts stated by her during her prior testimony to prove or disprove the innocence or guilt of the Defendant John Edward Hooper of the offenses alleged in the indictment."

found Hooper guilty on both counts.

The Court of Criminal Appeals reversed Hooper's convictions, stating:

> "Contrary to the dicta contained in Randolph [v. State], 348 So.2d [858] at 866 [Ala.Cr.App. 1977], the Alabama Supreme Court clearly stated in Lester v. Jacobs, 212 Ala. 614, 618, 103 So. 682, 686 (1925): 'The general rule in this jurisdiction is that the testimony given on a former trial by a witness at the last trial is only admissible, after a proper predicate, for the purpose of contradiction or impeachment; it is not competent as cumulative or original evidence.' (Emphasis added). Accord, Manning v. State, 217 Ala. 357, 359, 116 So. 360, 361 (1928) (testimony given at a preliminary hearing could have been introduced, 'not as original evidence of fact, but for the purpose of testing the recollection of the witness, or for impeachment') (emphasis added); Porter v. Louisville & Nashville R.R., 202 Ala. 139, 142, 79 So. 695, 608 [sic] (1918) ('In no event could [the prior testimony] have been received as original evidence ..., nor do we assume that it was offered for that purpose') (emphasis added). Cf. Corona Coal & Iron Co. v. Callahan, 202 Ala. 649, 650, 81

> So. 591, 592 (1919) (in suit for malicious prosecution, it was reversible error to admit testimony from the underlying trial as original evidence); E. E. Yarbrough Turpentine Co. v. Taylor, 201 Ala. 434, 435, 78 So. 812, 813 (1918) (same); Thompson v. Richardson, 96 Ala. 488, 492, 11 So. 728, 729 (1892) (same). In the event a witness's inconsistent testimony may be considered for impeachment purposes only and not as independent or original evidence. See, Manning v. State, 217 Ala. at 359, 116 So. at 362; Kennedy v. State, 85 Ala. 326, 331, 5 So. 300, 301 (1888)."

Hooper v. State, _____ So. 2d at _____.

Even though the Court of Criminal Appeals applied the rule of evidence contained in these prior cases, that court, nevertheless, pointed out that the soundness of the rule had been questioned in Randolph v. State, 348 So.2d 858 (Ala.Cr.App. 1977), a case that was later described as documenting "wide-spread dissatisfaction with the traditional rule" and as citing cases and writings of many judges and scholars who

"have pressed for repudiation of the rule that prior inconsistent statements of a non-party witness have no substantive consequence in a present trial." Hooper v. State, _____ So.2d _____, quoting Gamble, Howard, & McElroy, The Turncoat or Chameleonic Witness: Use of His Prior Inconsistent Statement, 34 Ala.L.Rev. 1, 18 (1983), which also had cited Randolph.

It is apparent that the Court of Criminal Appeals felt constrained, and rightfully so, to follow this Court's earlier cases holding that prior inconsistent statements could never be used as substantive evidence.

The rule that this Court had previously set out is clear. The reason justifying that rule is that such evidence is "purely hearsay," but courts have found little difficulty in carving out exceptions to the hearsay rule in those many instances

when the testimony, even though hearsay, is considered to be credible enough to justify its presentation to a trier of fact.

It is clear to us that the modern trend is to allow a prior inconsistent statement to be used as substantive evidence, provided, of course, that the prior inconsistent statement was given under oath, was subject to the penalty of perjury, and was made at a trial, hearing, or other proceeding, or in a deposition. This modern trend is in line with Federal Rule of Evidence 801, which provides:

> "(d) Statements which are not hearsay. -- A statement is not hearsay if --
>
> "(1) Prior statement by witness. -- The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition...."

A number of states have adopted rules of evidence that include a rule substantially similar to Rule 801(d)(1)(A), Fed.R.Evid.

Hooper suggests that this Court should not adopt such a rule of evidence but that if a rule similar to Rule 801(d)(1)(A) Fed.R.Evid., is desirable for Alabama, then the legislature is the proper body to adopt it. We find no limitation upon this Court's power to adopt the rule by Court decision, because this Court has broad powers to adopt rules of procedure. See Amendment 328, § 6.11, Constitution of Alabama, 1901. Other state supreme courts have by case law adopted rules similar to the federal rule. See State v. Almeda, 211 Conn. 441, 560 A.2d 389 (1989), and State v. Whelan, 200 Conn. 743, 513 A.2d 86, cert. denied, 479 U.S. 994 (1986); Gibbons v. State, 248 Ga. 858, 286 S.E.2d 717 (1982) (the Supreme Court of Georgia held that a prior inconsistent state-

ment of a witness could be used as substantive evidence even though the prior statement was not made under oath in a judicial proceeding or deposition, as the federal rule requires). The Georgia Supreme Court set forth some of the benefits from a rule allowing the use of prior inconsistent statements as substantive evidence:

> "We foresee these salutary effects:
>
> "(a) Once a declaration is made, both the State and the defense are accorded some measure of protection from the erratic or unpredictable witness, in that his declaration can be considered substantively where the witness appears and is subject to cross-examination, notwithstanding variant testimony from the stand.
>
> "(b) Similarly, both sides are assured a measure of protection against efforts to influence the testimony of a witness, as the prior declaration is no longer effectively revocable at the will of the witness.
>
> "(c) For the same considerations witnesses . are

> protected from proper attempts to influence testimony--the potential gain from that impropriety being diminished substantially by the adoption of this rule.
>
> "If, from all the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court.' Judge Learned Hand, in DiCarlo v. United States, 6 F.2d 364, 368 (2d Cir. 1925)."

248 Ga. at 864, 286 S.E.2d at 722 (emphasis original).

We should not be understood as expressing any view on the question of whether a prior inconsistent statement not made under oath can be used as substantive evidence when the declarant takes the stand and is subject to cross-examination. That question is not before us.

If this case had been tried in a

federal court, it seems that the daughter's prior inconsistent statement would have been admissible as substantive evidence under Rule 801(d)(1)(A), Fed.R.Evid. We think the federal rule is a good rule, that it does not substantially prejudice the rights of a defendant to a fair trial, and that it fosters a search for the truth.

We think that it is time that this Court changed our rule; therefore, after examining the record, considering the arguments of the parties, and reevaluating the rule against using prior inconsistent statements as substantive evidence, we hereby change that rule. We hold that a prior inconsistent statement of a witness who takes the stand and is available for cross-examination may be used as substantive evidence if the prior statement was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or

in a deposition. All previous decisions of this Court to the contrary are hereby overruled.

The judgment of the Court of Criminal Appeals is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Hornsby, C.J., and Shores, Houston, and Steagall, JJ., concur.

Jones, Almon, and Adams, JJ., dissent.

ALMON, JUSTICE (dissenting).

If the defendant in fact committed the offenses for which he has been convicted, his conduct is most certainly both legally culpable and morally reprehensible. It is because of the emotional reaction that such acts engender, coupled with our natural zeal to protect children and to punish those who harm them, that courts must be especially careful to remain objective when presiding over or reviewing cases of this nature. The question before us, however, is whether the State has presented legal evidence that can be considered in determining whether the State has met its burden of proof beyond a reasonable doubt. If the earlier, now recanted, testimony is "substantive evidence," a case can be submitted to the jury on that testimony alone. The rule announced by the majority is not limited to sexual offenses and will apply to all

criminal prosecutions, and, for that matter, to all civil actions.

The rule prohibiting the use of prior inconsistent statements as substantive evidence, which the majority does away with in its opinion, has been a fundamental part of the accused's right to a fair trial for over 100 years. Because of the important constitutional aspects of the rule, I cannot agree with the majority's implication that it can be abolished as readily as a rule of procedure could be or as easily as a merely arbitrary rule of evidence. In addition, I do not agree that the now-abolished rule was based solely on the hearsay rule. It was also based on the accused's right to confront and thoroughly cross-examine witnesses against him, a right guaranteed by the Confrontation Clause of the Sixth Amendment to the United States Constitution and Art. I, § 7, of the Alabama Constitution. "While

hearsay rules and the Confrontation Clause ... protect similar values, it is quite a different thing to suggest ... that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law." California v. Green, 399 U.S. 149, 155 (1970).

Cross-examination has been called "the greatest legal engine ever invented for the discovery of truth." 5 J. Wigmore, A Treatise on the System of Evidence in Trials at Common Law, § 1367, at 29 (3d Ed. 1940). Cross-examination must be an adversarial proceeding to be effective. Ruhala v. Roby, 379 Mich. 102, 150 N.W.2d 146 (1967). The goals of cross-examination are best achieved by questioning the witness at the time the statement is made, in the presence of the same trier of fact who must ultimately assess the witness's credibility. The principal

virtue of cross-examination "is in its immediate application of the testing process. Its strokes fall while the iron is hot." State v. Saporen, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939).

Under the change effected by the majority's opinion, the accused's opportunity to confront the witness against him in a face-to-face, adversarial proceeding, at the time the damaging statement is made, is destroyed. Instead, the accused is placed in the untenable position of cross-examining a now friendly witness regarding testimony given at a time when the witness was hostile. Instead of trying to impeach the witness's present testimony, the accused must, instead, attempt to mitigate the impact of the witness's prior statement, while at the same time trying to make the witness's present testimony appear credible. The near-impossibility of this undertaking has been

recognized by the Michigan Supreme Court:

> "No matter how deadly the thrust of the cross-examiner, the ghost of the prior statement stands. His questions will always sound like attempts to permit the witness to explain why [she] changed [her] story before coming to court, with the jury being left to infer that [she] might have been induced to change [her] story in the intervening months or years, for some unrevealed and sinister reason."

Ruhala v. Roby, supra, 379 Mich. at 128, 150 N.W.2d at 158.

An additional problem created by allowing prior inconsistent statements to be used as substantive evidence is that the jurors are unable to adequately assess the witness's credibility by observing her demeanor at the time the prior statement was given. Instead, they must rely on the reading of a cold written record. That is simply not sufficient. As noted by Judge Learned Hand, "the bearing and delivery of a witness will usually be the dominating

factors" in determining the witness's credibility. NLRB v. Universal Camera Corp., 190 F.2d 429, 430 (2d Cir. 1951).

The perjury question is also very troubling. If a witness testifies that a traffic light was red and then testifies that it was green, what probative effect should the law give to that witness's testimony? In mathematics when you add +1 and -1, the answer is 0. How can a nullity add any weight on the "guilty" side of the scales of justice? While we are not dealing with mathematics, I am nevertheless concerned that this kind of self-contradictory testimony can be used to overcome the presumption of innocence.

For the foregoing reasons, I must dissent.

Jones and Adams, JJ., concur.

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

RE: 89-1314

Ex parte State of Alabama

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS

(Re: John Edward Hooper

vs.

State)

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

Application for rehearing overruled. No opinion written on rehearing.

Maddox, J. - Hornsby, CJ., Shores, Houston, Steagall and Ingram, JJ., concur; Adams, J., dissents.

02/08/91

Robert G. Esdale, Clerk
Supreme Court of Alabama